

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

MELVIN SIMKO, Register No. 1035464,)
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Plaintiff,)
)
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v.) No. 04-4148-CV-C-SOW
)
)
JILL McGuIRE, et al.,)
)
)
Defendants.)

ORDER

On December 6, 2005, the United States Magistrate Judge recommended dismissing plaintiff's claims. The parties were advised they could file written exceptions to the recommendation, pursuant to 28 U.S.C. § 636(b)(1)(C). No exceptions have been filed, even though plaintiff requested and was granted an extension of time in which to do so.

A review of the record convinces the court that the recommendation of the Magistrate Judge is correct and should be adopted.

Inmates who file an appeal with the United States Court of Appeals for the Eighth Circuit are required to pay the full \$255.00 appellate filing fee, regardless of the outcome of the appeal. *Henderson v. Norris*, 129 F.3d 481, 484 (8th Cir. 1997). The filing of a notice of appeal is considered a consent by the inmate to allow prison officials to deduct an initial partial appellate filing fee and later installments from the prisoner's account.

IT IS, THEREFORE, ORDERED that the report and recommendation of the Magistrate Judge is adopted [25]. It is further

ORDERED that defendants' motion of June 14, 2005, for dismissal is granted, as follows:

- 1) plaintiff's claims against defendant McGuire are dismissed for failure to state a claim against her under 42 U.S.C. § 1983;
- 2) plaintiff's claims against defendants Reynolds and Oxford in their official capacities are dismissed because the claims are barred by Eleventh Amendment immunity; and

3) plaintiff's remaining claims against defendants Reynolds and Oxford in their personal capacities are dismissed, without prejudice to refiling, for failure to exhaust his administrative remedies prior to filing suit, pursuant to 42 U.S.C. § 1997e.

/s/Scott O. Wright

SCOTT O. WRIGHT

Senior United States District Judge

Dated: 2-14-06